

REMARKS

This Office Action Response is submitted in reply to the Office Action mailed on January 25, 2008. Claims 1, 7-8, 15, 17, 20-21, 26, 28, 31, 33 have been amended herein, and claims 5, 16, 18, 27, 29, and 37-38 have been canceled herein. As a result, claims 1-4, 6-15, 17, 19-26, 28, 30-36, and 39-40 are presented herein for examination.

Claim Rejections - 35 USC §102

The Examiner rejected claims 1-4, 14-17, 19, 23-28, 30, 32-34 and 40 under 35 USC § 102(e) as being anticipated by Wentink (US 2004/0136339).

Claim 1 has been amended herein to recite the limitations of claim 5, and claim 5 has been canceled. Claim 15 has been amended herein to recite the limitations of claims 16 and 18, and claims 16 and 18 have been canceled. Claim 26 has been amended herein to recite the limitations of claim 27 and 29, and claims 27 and 29 have been canceled. Claim 33 has been amended herein to recite the limitations of claims 37 and 38, and claims 37 and 38 have been canceled. Since claims 5, 16 and 18, 29, and 37 and 38 were not rejected as anticipated by Wentink, it is believed that the rejection should be withdrawn.

Claim Rejections - 35 USC §103

The Examiner rejected claims 5-13, 18, 20-22, 29, 31 and 35-39 under 35 USC § 103(a) as being unpatentable over Wentink and well-known prior art.

In the rejection, the Examiner admitted that “Wentink, however, fails to specifically disclose the IEEE 802.11i CCMP, TKIP, RC4, and Michael Protocols as claimed.” Furthermore, instead of citing a reference in which such protocols are disclosed with an earlier date than the filing date of the present application, the Examiner merely stated that:

The examiner contends, however, that such IEEE 802.11 protocols are very well known in the art and the examiner takes official notice as such.

The Applicant hereby traverses the Examiner’s above statement as being sufficient to establish obviousness for several reasons that will be discussed, below.

The Examiner's statement is based only on personal knowledge and is hereby traversed

The Examiner provided no evidence in support of the above statement. In fact, the Examiner based the statement only on official notice, which means that the Examiner's statement was based only on the Examiner's personal knowledge. The Applicant hereby respectfully and seasonably traverses the Examiner's statement. See MPEP § 2144.03 C. The Applicant challenges the factual basis for the official notice based on the fact that the IEEE 802.11i standard was not ratified until June 24, 2004, after the filing date of the present application, as discussed in further detail, below.

The Examiner's statement must be supported by an affidavit or other documentary evidence

Since the Examiner is basing the statement on the Examiner's personal knowledge, and since the Applicant has traversed the statement and the official notice, the Applicant hereby respectfully requests and hereby calls upon the Examiner to set for such facts in an Examiner's affidavit. It is respectfully pointed out that the Examiner appears to have no discretion not to provide an affidavit, other than withdrawing the rejection or providing other documentary evidence, because 37 CFR 1.104(d)(2) states that an affidavit must be provided:

(2) When a rejection in an application is based on facts within the personal knowledge of an employee of the Office, the data shall be as specific as possible, and the reference must be supported, when called for by the applicant, by the affidavit of such employee, and such affidavit shall be subject to contradiction or explanation by the affidavits of the applicant and other persons.

Thus, without supporting documentary evidence per MPEP § 2144.03 C, or without an Examiner's affidavit as required by 37 CFR 1.104(d)(2), the rejection should be withdrawn.

The Examiner's statement fails to meet the time requirement of 35 USC § 103

Furthermore, the Examiner's statement, above, in support of the rejection fails to provide a sufficient rationale for an obviousness rejection since the Examiner's statement provides no evidence of whether such a statement would apply to one of ordinary skill in the art at the time of the invention. The Examiner's attention is kindly directed to 35 U.S.C. § 103(a):

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made. (Emphasis added)

For example, how does the Examiner know that the IEEE 802.11i protocol was well known at least as early as the Applicant's filing date of March 17, 2004? Did the Examiner participate in the IEEE 802.11i standard? Did the Examiner read an article or read a published patent application regarding the 802.11i standard that was published or had an effective filing date earlier than March 17, 2004? The Examiner's statement provides no such insight regarding time as required by the statute. Therefore, the Applicant requests that the Examiner set forth such facts in an Examiner's affidavit, or to provide other documentary evidence, clearly establishing the basis on which the Examiner took judicial notice, or to otherwise withdraw the rejection. Thus, without an affidavit or other documentary evidence, the Examiner's statement in support of the rejection is *prima facie* insufficient to establish obviousness of the claimed subject matter since the Examiner has not provided any supporting evidence that the Examiner's rationale would have been applicable at the time the invention was made as required by 35 USC § 103(a).

The Examiner's statement is rebutted by the following evidence

In any event, the Examiner's statement that "such IEEE 802.11 protocols are very well known in the art" [at the time of the invention] is hereby contradicted by the fact that the IEEE 802.11i standard was not even ratified until June 24, 2004, which is after the March 17, 2004 filing date of the present application. See IEEE 802.11i-2004 [online]. Wikipedia [retrieved on June 25, 2008]. Retrieved from the Internet: <URL: <http://en.wikipedia.org/wiki/802.11i>>.

Thus, the question is raised regarding the Examiner's statement how it would be possible for the IEEE 802.11i standard to be "very well known" before the standard was even ratified. Without evidence supporting the Examiner's statement, such as an Examiner's affidavit or other documentary evidence, it is believed the rejection should be withdrawn.

Conclusion

Applicant respectfully submits that the claims are in condition for allowance and notification to that effect is earnestly requested. The Examiner is invited to telephone the undersigned at (303) 495-3700 to facilitate prosecution of this application.

If necessary, please charge any additional fees or credit overpayment to Deposit Account No. 50-4238.

Respectfully submitted,

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